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Sanctions or Tort? A Review of Ohio's Treatment of Independent Causes of Action for Spoliation of Evidence

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SANCTIONS OR TORT? A REVIEW OF OHIO'S TREATMENT OF INDEPENDENT CAUSES OF ACTION FOR SPOLIATION OF EVIDENCE

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I. INTRODUCTION

Spoliation of evidence has plagued the court system for centuries and threatens to undermine the right to a fair trial, which is an essential concept of American justice. Generally, spoliation refers to the "destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[1] Courts universally recognize that spoliation "can destroy fairness and justice" by increasing the likelihood of erroneous decisions.[2] Spoliation can also increase the costs of litigation by forcing parties to reconstruct destroyed evidence or to produce other evidence, which may not be as accessible or persuasive.[3]

For those reasons, courts have been attempting to find ways to combat spoliation ever since the English case of *Armory v. Delamirie*[4] was decided in 1722.[5] In that case, the adverse inference was introduced for the first time as a method to diminish the prejudicial effects that spoliation has on judicial decisions.[6] The adverse inference allows the Judge to instruct the jury that altered or destroyed evidence is of the utmost importance and would have been unfavorable to the spoliating party's case. [7] Since then, however, courts have developed a number of methods, other than the adverse inference, to combat spoliation.[8] Most recently, some states' courts have begun to develop independent tort claims for spoliation.[9]

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[1] West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (citing BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)); *see also* Willard v. Caterpillar, Inc., 48 Cal. Rptr. 2d 607 (Ct. App. 1995) ("Spoliation [of evidence] is the destruction or significant alteration of evidence, or the failure to preserve evidence for another's use in pending or future litigation."); Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc., 901 So. 2d 84 (Ala. 2004) ("Spoliation [of evidence] is an attempt by a party to suppress or destroy material evidence favorable to the party's adversary . . . [and] is sufficient foundation for an inference of the spoliator's guilt or negligence.").

[2] *See* Cedars-Sinai Med. Ctr. v. Super. Ct., 954 P.2d 511, 515 (Cal. 1998).

[3] *See id.*

[4] Armory v. Delamirie, 93 Eng. Rep. 664 (1722).

[5] *See* Sean R. Levine, *Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth?*, 104 W. VA. L. REV. 419, 424 (2002).

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

Traditionally, courts have relied on various sanctions to combat the negative effects of spoliation,[10] but a number of states' courts have recently begun to explore separate tort claims to attempt to further combat and deter spoliation.[11] Under the torts, the jury is left to confer the damages that would have been awarded in the underlying claim, had the evidence not been destroyed or altered.[12]

Proponents of the various spoliation torts claim that they help to further deter the destruction of evidence as well as provide compensation to the victim where it otherwise may not have been available.[13] Recognizing independent torts for spoliation, however, comes with significant problems. Perhaps the biggest of which, is the fact that there is frequently no way of knowing what the altered or destroyed evidence would have shown.[14] Thus, the jury is left to speculate about the fact of harm and amount of damages.[15] A second major criticism is that the torts, by their very nature, are derivative.[16] Derivative torts are those that arise based on litigation related misconduct that occurred in an underlying lawsuit.[17] Derivative torts violate the general policy against disturbing the finality of adjudication, and, as a result, invite spurious claims that prolong litigation.[18] Lastly, many argue that independent torts for spoliation are unnecessary, as the majority of states have found that traditional methods of addressing spoliation are adequate to both deter and remedy the destruction of evidence.[19] Ohio should join the majority of states in refusing to recognize independent torts for spoliation because the torts are inherently speculative, they invite spurious claims that prolong litigation, and because traditional methods of addressing spoliation adequately deter and provide a remedy.

The Note that follows will explore the different variations of independent torts for spoliation as well as various policy arguments used by supporters and critics of the torts. Specifically, Section II of this Note will explore the history behind the recognition of independent torts for spoliation. Section III will explain the traditional remedies courts have used to combat spoliation of evidence, and Section IV will

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[10] *See generally* FED. R. CIV. P. 37. *See also* Shannon D. Hutchings, *Tortious Liability for Spoliation of Evidence*, 24 AM. J. TRIAL ADVOC. 381, 400 (2000) ("Most States have a civil procedure rule modeled after Federal Rule 37.").

[11] Hutchings, *supra* note 10, at 383.

[12] *Id.*

[13] *See* Smith v. Super. Ct., 198 Cal. Rptr. 829, 832 (Ct. App. 1984) (finding "[f]or every wrong there is a remedy" and not allowing the tort "encourage[s] violence and invite[s] depredation"); *see also* Hannah v. Heeter, 584 S.E.2d 560, 566 (W. Va. 2003) (Recognizing that "[f]or every wrong there is supposed to be a remedy somewhere" and that "additional foundations of tort law are morality and deterrence.").

[14] Cedars-Sinai Med. Ctr. v. Super. Ct., 954 P.2d 511, 518 (Cal. 1998)

[15] *Id.*

[16] *See id.* at 515 (recognizing longstanding policy against derivative tort remedies for litigation related misconduct).

[17] *See id.*

[18] *See id.* (finding derivative tort remedies encourage "a spiral of lawsuits").

[19] Rachel L. Sykes, *A Phantom Menace: Spoliation of Evidence in Idaho Civil Cases*, 42 IDAHO L. REV. 821, 848 (2006).

detail the various forms of the spoliation tort. Section V of this paper will examine various policy arguments employed by supporters and detractors of the torts. Section VI will examine Ohio's treatment of the various forms of the spoliation torts. Lastly, Section VII will analyze the merits of the various policy arguments as they apply to the different types of the spoliation tort. In addition, it will seek to show why Ohio should not recognize spoliation torts in any of their manifestations.

II. HISTORY OF INDEPENDENT TORTS FOR SPOLIATION

The recognition of independent torts for spoliation is a relatively new trend. In 1984, *in Smith v. Superior Court*, California became the first state to recognize a separate cause of action for spoliation.[20] In *Smith*, the plaintiff was driving her automobile when the left tire of an oncoming car flew off the vehicle and into the plaintiff's windshield.[21] The plaintiff was left permanently blind from the accident and filed suit against the dealer that customized the vehicle's wheels before selling it.[22] Following the accident, the vehicle was towed by the dealer and taken in for repairs.[23] The dealer, however, was directed by the plaintiff's attorney to maintain certain physical evidence for further investigation.[24] Despite agreeing with the plaintiff's attorney to preserve the evidence, the evidence was subsequently "destroyed, lost or transferred . . . making it impossible for the [plaintiff's] experts to inspect and test those parts to pinpoint the cause of the failure of the wheel assembly on the van."[25] Since the destruction of the evidence made it impossible for the plaintiff to recover any damages in the underlying suit, the court allowed the plaintiff to bring a separate tort claim against the defendant for intentional spoliation. [26] In doing so, the court reasoned that no innocent victim should go uncompensated stating that: "[f]or every wrong there is a remedy."[27] The court also cited a recent trend toward recognizing new torts, including, *inter alia,* intentional infliction of emotional distress, invasion of privacy, and infliction of prenatal injuries as the impetus for allowing the new spoliation tort.[28]

A few months later, in *Bondu v. Gurvich*, the Florida Third District Court of Appeals became one of the first courts to recognize an independent tort for the negligent destruction of evidence.[29] In *Bondu*, the plaintiff was the spouse of a man

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[20] Smith v. Super. Ct., 198 Cal. Rptr. 829, 832 (Ct. App. 1984).

[21] *Id.* at 831.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See generally id.*

[27] *Id.*

[28] *Id.* at 832 ("When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not itself operate as a bar to a remedy.").

[29] Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

who died during heart surgery.[30] After her husband's death, she subsequently filed suit against the hospital and the anesthesiologists for negligence.[31] During discovery, the plaintiff requested certain medical records that the hospital had apparently lost.[32] The plaintiff subsequently claimed that the loss of the medical records frustrated her ability to pursue her case.[33] The *Bondu* Court allowed the plaintiff to proceed with her cause of action for negligent spoliation, finding that the hospital had a duty to "maintain medical records . . . imposed by administrative regulations."[34] In doing so, the court also reasoned that tort law is "anything but static" and that "new and nameless torts" are constantly being recognized to provide adequate compensation to those who have been wronged.[35]

Since the *Smith* and *Bondu* decisions, a number of variations of the spoliation tort have been developed, including first party intentional spoliation,[36] third party intentional spoliation,[37] first party negligent spoliation,[38] and third party negligent spoliation.[39] Several jurisdictions, including West Virginia, Alaska, Montana, the District of Columbia, Illinois, New Mexico, and Ohio recognize the spoliation torts in one or more of their manifestations.[40] A majority of states, however, have refused

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[30] *Id.* at 1309.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1312.

[35] *Id.* (quoting PROSSER, *supra* note 35, at § 1, pp. 3-4 (4th ed. 1971)) ("New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none has been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not itself operate as a bar to the remedy.").

[36] Nichols v. State Farm Fire & Cas. Co., 6 P.3d 300 (Alaska 2000); Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993); Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003).

[37] *Nichols*, 6 P.3d 300; Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mont. 1999); Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995); *Howard Johnson Co.*, 615 N.E.2d at 1038; *Hannah*, 584 S.E.2d 560.

[38] Holmes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. 1998); *Bondu*, 473 So. 2d 1307.

[39] *Holmes*, 710 A.2d at 846; Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995); *Oliver*, 993 P.2d at 18; *Hannah*, 584 S.E.2d 560.

[40] *Hannah*, 584 S.E.2d 560 (recognizing independent tort for intentional spoliation and for some third party negligent spoliation, but rejecting first party negligent spoliation as independent tort); *Nichols*, 6 P.3d 300 (recognizing independent tort for first party and third party intentional spoliation but rejecting independent tort for first-party negligent spoliation); *Oliver*, 993 P.2d 11 (recognizing independent tort for negligent or intentional third party spoliation, but not for first party spoliation); *Holmes*, 710 A.2d 846 (recognizing independent tort for negligent third-party spoliation); *Boyd*, 652 N.E.2d 267 (recognizing independent tort of negligent spoliation against principal defendant's liability insurer); *Coleman*, 905 P.2d 185 (recognizing tort for intentional third party spoliation, but not for negligent spoliation);

to recognize separate causes of action for spoliation, regardless of what form the torts take.[41] As these states have begun to note many of the problems associated with independent torts for spoliation, other states have begun to rethink their position on the torts.

For example, in *Cedars-Sinai Medical Center*, just fourteen years after *Smith*, the Supreme Court of California overruled the Second District Court of Appeal's decision to recognize separate causes of action for intentional spoliation.[42] In *Cedars-Sinai*, the plaintiff was injured during birth and alleged that the defendant hospital intentionally destroyed evidence relevant to his malpractice action.[43] The court recognized that "[t]he intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation."[44] However, even though the court noted that spoliation destroys judicial integrity, it held that such destruction was not enough to justify recognizing a separate cause of action for spoliation.[45] The court refrained from recognizing the spoliation torts because it found that they were inherently speculative, violated the policy against derivative tort remedies, and decided that traditional remedies were adequate to deter spoliation.[46]

California was not the only state to reverse its stance on recognizing separate causes of action for spoliation.[47] In 2005, in *Martino v. Wal-Mart Stores, Inc.,* the Supreme Court of Florida followed suit and overruled the Third District Court of Appeal's decision in *Bondu*, which recognized negligent spoliation as a separate tort.[48] In *Martino*, the plaintiff's arm was injured by a collapsible shopping cart

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Howard Johnson Co., 615 N.E.2d 1037 (recognizing independent tort for intentional first party and third party spoliation).

[41] Gardner v. Blackston, 365 S.E.2d 545 (Ga. Ct. App. 1998) (rejecting claim for first-party spoliation); Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005) (rejecting claim for first-party spoliation); Meyn v. State, 594 N.W.2d 31 (Iowa 1999) (rejecting tort for third-party negligent spoliation and stating in dicta first-party claim also not cognizable); Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124 (Miss. 2002) (rejecting independent tort for intentional first-party or third-party spoliation); *Oliver*, 993 P.2d 11 (rejecting cause of action for first-party spoliation); Timber Tech Engineered Bldg. Prods. v. The Home Ins. Co., 55 P.3d 952 (Nev. 2002) (rejecting cause of action for first-party spoliation); Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001) (rejecting independent tort for spoliation but permitting similar remedy under theory of fraudulent concealment); Ortega v. City of New York, 876 N.E.2d 1189 (N.Y. 2007) (rejecting independent tort for spoliation but recognizing action for negligently or intentionally impairing right to bring action against tortfeasor).

[42] *See* Cedars-Sinai Med. Ctr. v. Super. Ct., 954 P.2d 511 (Cal. 1998).

[43] *Id.* at 512.

[44] *Id.*

[45] *Id.* at 515 ("That alone . . . is not enough to justify creating tort liability for such conduct.").

[46] *See id.* at 517 ("Weighing against our recognition of a tort cause of action for spoliation in this case are both the strong policy favoring use of nontort remedies rather than derivative tort causes of action to punish and correct litigation misconduct and the prohibition against attacking adjudications on the ground that evidence was falsified or destroyed.").

[47] Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005).

[48] *Id.*

while shopping at Wal-Mart.[49] The plaintiff filed suit alleging Wal-Mart was negligent in maintaining its shopping carts.[50] During discovery, the plaintiff requested the shopping cart and a copy of the video surveillance tape, but Wal-Mart was unable to produce the items.[51] In declining to recognize a separate cause of action for negligent spoliation, the court held that traditional sanctions were sufficient to combat the destruction of evidence.[52]

As can be seen from the cases above, two of the first states to recognize separate spoliation torts, California and Florida, began to notice many of the same difficulties that accompany recognizing other derivative torts.[53] But on top of that, spoliation torts present an additional problem, mainly that there is often no way to tell what the evidence would have shown had it not been destroyed or altered.[54] The inability to show exactly what the evidence would have proved, often times, makes it very difficult to show that its destruction was the proximate cause of the loss in the underlying case.[55] Yet, despite all of the problems associated with independent torts for spoliation, there are still a few states, including Ohio, that have not retreated from their recognition of one or more of the spoliation torts.[56]

III. TRADITIONAL METHODS OF COMBATTING SPOLIATION

Traditionally, courts have used various sanctions and criminal statutes to combat the ongoing problem of spoliation. Courts generally have broad discretion in imposing sanctions for spoliation, which allows them to fashion appropriate remedies under specific circumstances.[57] The Federal Rules of Civil Procedure, on which most state rules of civil procedure are based, also provide a wide variety of sanctions that could be imposed.[58] In addition to sanctions, several states have passed statutes that make it a criminal act to destroy relevant evidence relating to

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[49] *Id.* at 344.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 346 ("[W]hen evidence [is] intentionally lost, misplaced, or destroyed by one party, trial courts [are] to rely on sanctions found in Florida Rule of Civil Procedure 1.380(b)(2) . . . .").

[53] *See* Cedars-Sinai Med. Ctr. v. Super. Ct., 954 P.2d 511 (Cal. 1998); *see also Martino*, 908 So. 2d 342.

[54] *See Cedars-Sinai Med. Ctr.*, 954 P.2d 511.

[55] *See id.*

[56] *See supra* note 40.

[57] *See* Brian F. Stayton & Jesse L. Ray, *Spoliation of Evidence: An Overview and Practical Suggestions*, 24 CONSTR. LAW. 31, 32 (2004) ("Courts have exercised wide discretion in fashioning discovery sanctions for spoliation to fit the particular case.").

[58] Hutchings, *supra* note 10, at 400 (quoting Marrocco v. Gen. Motors Corp., 966 F.2d 220, 225 (7th Cir. 1992)) ("Quite simply, sanctions can be employed for a wide array of purposes . . . .").

pending or probable litigation.[59] The following section will explore the sanctions and criminal statutes courts have traditionally used to combat spoliation.

A. Sanctions

Courts may impose a wide variety of sanctions for spoliation.[60] The typical vehicle courts use to impose these sanctions is Federal Rule of Civil Procedure 37.[61] A majority of states, including Ohio, also have a procedural rule modeled after Federal Rule 37.[62] Federal Rule 37 is the primary rule by which courts sanction parties for failing to cooperate during the discovery process.[63] Rule 37, however, only governs violations of a court order or discovery request and does not apply to spoliation that occurs prior to litigation.[64] But, courts do have the inherent power to impose a wide variety of sanctions for pre-litigation spoliation and are generally given broad discretion to do so:[65] Sanctions will only be reversed for clear abuse of discretion.[66] Typical sanctions include, but are not limited to, the granting of an adverse inference, default judgment and dismissal of the case, exclusion of evidence or testimony, and monetary sanctions.[67] Each of these sanctions will be described and discussed below.

1. Adverse Inference

Perhaps the most effective and valuable evidentiary sanction designed to combat spoliation is the adverse evidentiary inference. Where evidence critical to the plaintiff's case has been destroyed or concealed by a defendant, courts will often permit an adverse inference to be drawn against the spoliating party.[68] The party whose evidence has been destroyed or altered is allowed to introduce evidence of the allegedly destroyed materials.[69] The alleged victim bears the burden of proving that the materials were altered or destroyed.[70] If the judge finds that the opposing party

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[59] *See* ALA. CODE § 13A-10-129 (1982); ALASKA STAT. § 11.56.610 (1996); N.Y. PENAL LAW § 215.40 (McKinney 1988); N.C. GEN. STAT. § 14-221.1 (1993); OHIO REV. CODE ANN. § 2921.12 (West 2013); 18 PA. CONS. STAT. ANN. § 5105 (West 2014); TEX. PENAL CODE ANN. § 37.09 (West 2013); UTAH CODE ANN. § 76-8-510 (repealed 2001); VA. CODE ANN. § 18.2-460 (2013); WIS. STAT. ANN. § 946.60 (West 2013).

[60] Hutchings, *supra* note 10, at 400; *see also* Stayton & Ray, *supra* note 57, at 32 ("Courts have exercised a wide discretion in fashioning discovery sanctions for spoliation to fit the particular case.").

[61] *See generally* FED. R. CIV. P. 37. Hutchings, *supra* note 10, at 400.

[62] Hutchings, *supra* note 10, at 400. *See generally* FED. R. CIV. P. 37.

[63] *See generally* FED. R. CIV. P. 37

[64] Hutchings, *supra* note 10, at 401.

[65] *Id.*

[66] *Id.*

[67] *See* FED. R. CIV. P. 37; *see also* OHIO R. CIV. P. 37.

[68] *See* Hutchings, *supra* note 10, at 405.

[69] *See* Levine, *supra* note 5, at 429.

[70] *Id.*

altered or destroyed evidence, he may instruct the jury to infer that the altered or destroyed evidence would have been unfavorable to the spoliating party.[71]

There are three main rationales for allowing the adverse inference to be used against a spoliating party. First, it deters intentional spoliation by placing the risk of an adverse inference on the spoliator.[72] Second, if a party intentionally destroys evidence, that evidence was likely detrimental to the party's case.[73] Lastly, the adverse inference protects the non-spoliating party by remedying the wrong committed by the spoliator.[74]

Jurisdictions are split in their determinations of when granting an adverse inference is appropriate, but most agree that an adverse inference should not be granted where the spoliator is able to show that the altered or destroyed evidence is of little value.[75] Jurisdictions also consider the level of culpability of the spoliator.[76] Courts will generally find the granting of an adverse inference appropriate only if the following elements are satisfied: "(1) an act of destruction; (2) discoverability of the evidence; (3) an intent to destroy the evidence; (4) occurrence of the act at a time after suit has been filed, or, if before filing, at a time when the finding is fairly perceived as imminent."[77] Although Ohio has held that the adverse inference may be used in cases of gross negligence,[78] most states will only give an adverse inference for evidence that has been destroyed intentionally.[79] Thus, the adverse inference generally does not serve as a remedy for parties whose evidence was negligently destroyed or altered.[80] The adverse inference is also not a remedy for those parties whose evidence was spoliated by a person who is not a party to the suit and who has no stake in the litigation.[81]

2. Default Judgment and Dismissal

Another option courts have when deciding cases in which evidence has been destroyed or tampered with is to dismiss the entire cause of action or to enter a

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[71] *See* Stayton & Ray, *supra* note 57, at 31 (An example of a typical spoliation inference jury instruction: "[w]hen evidence is within the control of a party whose natural interest it would be to produce that evidence, and that party destroys the evidence without adequate cause, it may be inferred that such evidence would be unfavorable to that party.").

[72] *See* Laurie Kindel & Kai Richter, *Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687, 695 (2000).

[73] *Id.*

[74] *Id.*

[75] Levine, *supra* note 5, at 428-29.

[76] *Id.*

[77] *Id.*

[78] *See* Roetenberger v. Christ Hosp., 839 N.E.2d 441, 448 (Ohio Ct. App. 2005) (leaving open possibility of adverse inference being used in cases of gross negligence).

[79] Levine, *supra* note 5, at 428-29.

[80] *See id.* at 429.

[81] *See id.*

default judgment for the non-spoliating party.[82] Since dismissal is an extremely severe penalty, however, it is reserved for the most egregious acts of spoliation.[83] Dismissal may not be imposed if there is a "lesser, but equally efficient remedy available."[84] Typically, this sanction is imposed on parties that have destroyed evidence intentionally and willfully for the purpose of weakening the opposing party's case.[85] Thus, "parties that intentionally spoliate evidence do so at considerable peril to their case."[86] Like the adverse inference, however, default judgment and dismissal generally do not apply to parties who spoliate evidence negligently or to third party spoliators with no stake in the litigation.[87]

3. Exclusion of Evidence and Testimony

Since dismissal and default judgment are such extreme penalties, the Federal Rules, and most states, also provide courts with the power to exclude spoliated evidence and testimony that is related to that evidence.[88] Although courts are somewhat reluctant to dismiss a case or enter default judgment when spoliation has occurred, exclusion of spoliated evidence and related testimony often achieves the same goal, without the harsh consequences of dismissal.[89] For example, a party that has spoliated evidence will often be prohibited from offering expert testimony related to the piece of evidence in question.[90] But, because the plaintiff bears the burden of proof on most issues, exclusion of evidence and related testimony is generally not as effective a remedy where evidence has been totally destroyed because total destruction makes it very difficult for the plaintiff to prove that the evidence was favorable.[91] Thus, for example, there is less of a need for the spoliating party to present an expert witness to rebut the non-spoliating party's claim, if the non-spoliating party cannot prove what the evidence would have shown in the first place.[92]

4. Monetary Sanctions

The Federal Rules, and most states, also allow courts to require a spoliator to pay money for the destruction, alteration, or concealment of evidence.[93] Monetary sanctions may be assessed in a number of situations. Some of the most common

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[82] *Id.* at 693.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See id.*

[88] *See* FED. R. CIV. P. 37; *see also* Kindel & Richter, *supra* note 72, at 694.

[89] Kindel & Richter, *supra* note 72, at 694.

[90] *See id.*

[91] *Id.*

[92] *See id.*

[93] *Id.*

situations include: assessing fees and costs associated with arguing evidentiary motions and motions for sanctions, discovery costs associated with willful destruction or concealment, and costs associated with exhausting a court's time and resources.[94] In cases of egregious acts of spoliation, the court may also multiply these monetary penalties in order to provide an adequate punishment to the spoliator.[95] Thus, monetary sanctions can be quite substantial if the spoliator's conduct is particularly flagrant.[96] As a result, these punitive fines can operate as a particularly good deterrent to potential spoliators.[97]

B. Criminal Statutes

A number of states, including Ohio, also have criminal statutes that make it a crime to destroy, alter, or conceal evidence.[98] For example, Ohio makes it a felony of the third degree to "alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation."[99] Ohio also makes it a crime to "[m]ake, present, or use any record, document, or thing, knowing it to be false and with the purpose to mislead a public official."[100] These statutes are designed to deter spoliation and apply equally to parties involved in the litigation and third parties.[101] However, the alleged spoliator must know "that an official proceeding or investigation is in progress, or is about to be or likely to be instituted."[102]

Although criminal statutes are designed to deter and punish spoliation, some commentators have suggested that, in practice, prosecutors are reluctant to pursue criminal charges against spoliators in civil litigation because they are busy prosecuting "real crimes."[103] The idea is that, in a civil case, punishment for spoliation is more properly handled by the trial court judge.[104] This view is just one reason why some commentators have supported creating various types of independent torts for spoliation.

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[94] *Id.*

[95] *Id.* at 695-96.

[96] *Id.* at 696.

[97] *See id.*

[98] *See* Hutchings, *supra* note 10, at 399.

[99] OHIO REV. CODE ANN. § 2921.12 (West 2013).

[100] *Id.*

[101] Levine, *supra* note 5, at 432 ("Another remedy that may persuade potential spoliators to act otherwise is the fact that many jurisdictions have obstruction of justice statutes that cover spoliation of evidence.").

[102] OHIO REV. CODE ANN. § 2921.12 (West 2013).

[103] Jonathan Judge, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 447 (2001) ("[C]ommentators have struggled to find cases where a spoliator has been criminally prosecuted for destroying evidence in a civil case. Part of the explanation lies with prosecutors, who are overwhelmed dealing with 'real crime,' and who no doubt see civil litigation spoliation as the trial judge's problem.").

[104] *Id.*

IV. TYPES OF INDEPENDENT SPOLIATION TORTS

When evidence relevant to litigation is destroyed or lost the consequences on the party that the evidence favored can be severe. In some cases, the loss of a single piece of critical evidence can prevent a party from proving a valid claim or defense. Traditionally, as discussed above, courts have used sanctions, ranging from discovery sanctions and presumptions to default, in an attempt to combat the harmful effects of spoliation.[105] Recently, however, a number of states have addressed whether to recognize several variations of independent torts for spoliation.[106] These variations include first party intentional spoliation, third party intentional spoliation, first party negligent spoliation, and third party negligent spoliation.[107] The following section will explore the different causes of action recognized in various states for spoliation of evidence.

A. Intentional Spoliation

Intentional spoliation refers to evidence that has been destroyed, altered, or concealed willfully for the purpose of disrupting the party's case.[108] It can refer to evidence willfully destroyed, altered, or concealed by either a party to the litigation or a third party that has undertaken a duty to preserve the evidence.[109] The following section will explore the two different types of intentional spoliation.

1. First Party Intentional Spoliation

A number of states, including Ohio, have recognized a tort for first party intentional spoliation of evidence.[110] First party intentional spoliation refers to the willful destruction or alteration of evidence by a person who is a party to the litigation for the purpose of defeating another party's recovery.[111] Generally, states recognizing first party intentional spoliation agree that the elements include: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts.[112]

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[105] *See generally* FED. R. CIV. P. 37.

[106] *See supra* notes 44-45.

[107] *See supra* notes 44-48.

[108] *See supra* note 1.

[109] *See* Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993) (recognizing independent tort for first party intentional spoliation and third party intentional spoliation); *see also* Nichols v. State Farm Fire & Cas. Co., 6 P.3d 300 (Alaska 2000); Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003) (recognizing first and third party intentional spoliation).

[110] *See Howard Johnson Co.*, 615 N.E.2d at 1038; *see also Nichols*, 6 P. 3d 300; *Hannah*, 584 S.E.2d 560.

[111] *See* Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995), *overruled by* Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148 (N.M. 2001) (intentional spoliation is "the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action").

[112] *Howard Johnson Co.*, 615 N.E.2d at 1037.

Ohio is one of only three states that recognize a cognizable tort for first party intentional spoliation.[113] The other two states are West Virginia and Alaska.[114] These states have traditionally given three main rationales for recognition of the tort: (1) "Permitting the independent tort action promotes the desire to protect testimonial candor and the integrity of the adversarial system;" (2) "the tort protects the probable expectation of a favorable judgment or defense in future litigation;" and (3) traditional remedies such as sanctions are not effective enough to deter spoliation.[115] A majority of courts that have considered a tort for first-party intentional spoliation, however, have rejected these rationales as insufficient to warrant recognition of the tort.[116]

2. Third Party Intentional Spoliation

Third party intentional spoliation refers to evidence that is willfully destroyed or altered by an individual who is not a party to the underlying suit.[117] The elements of third party intentional spoliation include: (1) the existence of a potential civil action; (2) a legal or contractual duty resulting from a written contract, special relationship, or court order, to preserve evidence which is relevant to that action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the potential civil action; (5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages.[118]

Generally, states have been less reluctant to recognize independent torts for third party spoliation.[119] Courts have determined that the main distinction between first and third party spoliation is the disparity in sanctions available for third party spoliators.[120] Although some sanctions are available against third parties, including monetary and contempt sanctions, many sanctions, such as the adverse inference and most discovery sanctions, are unavailable for use against a third party.[121] Thus, states recognizing third party intentional spoliation have reasoned that allowing a cause of action will not only help deter spoliation, but will also create a remedy against a third party where one would not otherwise be available.[122]

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[113] *Id.*

[114] *Nichols*, 6 P.3d 300; *Hannah*, 584 S.E.2d 560.

[115] *See* Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1130 (Miss. 2002).

[116] *See supra* note 40.

[117] *See Hannah*, 584 S.E.2d at 571.

[118] *See* Village of Roselle v. Commonwealth Edison Co., 859 N.E.2d 1 (Ill. App. Ct. 2006).

[119] *Id.*

[120] *See Hannah*, 584 S.E.2d at 571.

[121] Stayton & Ray, *supra* note 57, at 31 ("The distinction between parties and nonparties is premised on the idea that other remedies, such as spoliation inferences and discovery sanctions, influence only litigants and leave third-party spoliators undeterred.").

[122] *See Hannah*, 584 S.E.2d at 571 ("[R]ecovery under a separate tort is necessary because a third party is not subject to an adverse inference instruction or discovery sanctions. In regard to a party to a civil action, we believe that intentional spoliation of evidence is misconduct of such a serious nature, the existing remedies are not a sufficient response.").

B. Negligent Spoliation

In *Bondu v. Gurvich*, Florida became one of the first states to recognize the tort of negligent spoliation.[123] The *Bondu* Court noted that it would not need to "strike out boldly" in creating a new tort because negligent spoliation could be stated under existing negligence law.[124] As the negligent spoliation tort began to evolve, however, Florida courts began to recognize additional elements and no longer stated the claim as a simple negligence cause of action.[125] Some states do, however, hold that a claim for negligent spoliation may be brought under existing negligence law.[126] The following section will explore the two different causes of action for negligent spoliation.

1. First Party Negligent Spoliation

Several jurisdictions, at one point or another, have recognized a cause of action for first party negligent spoliation.[127] The majority of state courts that have addressed the issue, however, have rejected first party negligent spoliation as a separate tort.[128] Still, other states' appellate courts have been split as to whether first party negligent spoliation is a cognizable claim.[129]

States recognizing a separate cause of action for first party negligent spoliation have generally stated the elements of the claim as follows: (1) existence of potential civil action; (2) legal or contractual duty to preserve evidence which is relevant to potential litigation; (3) destruction of that evidence; (4) significant impairment in ability to prove the lawsuit; (5) causal relationship between evidence destruction and ability to prove lawsuit; and (6) damages.[130]

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[123] *See generally* Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

[124] *Id.* at 1312.

[125] *See* Cont'l Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990).

[126] Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995).

[127] Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831 (D. Kan. 1992) (applying Kansas law); Holmes v. Amerex Rent-A-Car, 710 A.2d 846 (D.C. 1998); *Bondu*, 473 So. 2d 1307.

[128] *See* Sykes, *supra* note 19, at 848 (quoting Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 355 (Ind. 2005)) ("Most [states] hold that available remedies fairly compensate parties harmed. Notwithstanding the policy considerations involved, they are 'minimized by existing remedies and outweighed by the attendant disadvantages.'").

[129] *See* Gicking v. Joyce Int'l Inc., 33 Pa. D. & C. 4th 208 (C.P. 1996) (recognizing cause of action for negligent spoliation); *see also* Swick v. N.Y. Times Co., 815 A.2d 508 (N.J. Super. Ct. App. Div. 2003) (holding trial court erred in dismissing cause of action for negligent spoliation); Manorcare Health Serv., Inc. v. Osmose Wood Preserving, Inc., 764 A.2d 475 (N.J. Super. Ct. App. Div. 2001) (recognizing cause of action for negligent spoliation). B*ut see* Rhoads v. Pottsville Hosp., 31 Pa. D. & C. 4th 500 (C.P. 1996) (declining to recognize a cause of action for negligent spoliation); Urban v. Dollar Bank, 34 Pa. D. & C. 4th 11 (C.P. 1996) (declining to recognize either intentional or negligent spoliation).

[130] Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303 (N.D. Fla. 2002) (applying Florida law).

Like simple negligence claims, states that recognize claims for first party negligent spoliation hold that the party must have a duty to preserve the evidence.[131] Furthermore, no general duty to preserve exists, but a duty can arise out of an agreement or contract, a statutory requirement, or an assumption of the duty by affirmative conduct.[132] If one of these duties applies, then a defendant owes a duty of care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.[133]

2. Third Party Negligent Spoliation

Third party negligent spoliation is committed when a person or entity, that is not a party to the underlying cause of action, has a duty to preserve evidence and fails to do so.[134] Several states, at one point or another, have recognized a cause of action for third party negligent spoliation.[135] Although very similar to first party negligent spoliation, the elements of a cause of action for third party negligent spoliation differ slightly. Most commonly, the elements are stated as follows: (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages.[136]

Once the first five elements are satisfied, there arises a rebuttable presumption that, but for the fact of the spoliation, the party injured would have prevailed in the pending or potential litigation.[137] The third party must then overcome that rebuttable presumption by introducing evidence that would support a finding that the opposing party would not have won even if the spoliated evidence had been available.[138] If the defendant is able to rebut the presumption, the plaintiff must convince the jury that the spoliated evidence was so important to his case that, without the evidence, the claim would not have survived a motion for summary judgment.[139]

V. POLICY CONSIDERATIONS

Both proponents and detractors of the spoliation torts are able to assert valid policy arguments for their respective positions. Specifically, there are seven different

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[131] Andersen v. Mack Trucks, Inc., 793 N.E.2d 962 (Ill. App. Ct. 2003); Wilhite v. Thompson, 962 So. 2d 493 (La. Ct. App. 2007).

[132] *See Andersen*, 793 N.E.2d at 966; *Wilhite*, 962 So. 2d at 498.

[133] *Andersen*, 793 N.E.2d at 966.

[134] *See* Oliver v. Stimson Lumber Co., 993 P.2d 11, 19-20 (Mont. 1999).

[135] Holmes v. Amrex Rent-A-Car, 180 F. 3d 294 (D.C. Cir. 1999); Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003); *Oliver*, 993 P.2d 11; Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995).

[136] *Hannah*, 584 S.E.2d at 570.

[137] *Id.*

[138] *Id.*

[139] *Id.*

policy arguments that courts have traditionally analyzed when deciding whether to recognize spoliation as a separate cause of action. These policy arguments will be explained in the section that follows.

A. Arguments in Favor of Independent Torts

There are three main policy arguments employed to advance the creation of separate causes of action for spoliation. First, courts are constantly recognizing new and nameless torts in order to properly compensate victims who ought to be afforded protection by the law.[140] Second, creating a separate spoliation torts deters future spoliators from destroying evidence.[141] Lastly, independent torts for spoliation promote judicial integrity.[142] The reasoning behind these policy arguments will be explained below.

1. Policy of Creating New Torts to Adequately Compensate Aggrieved Parties

One of the main arguments used to advance the creation of separate causes of action for spoliation is that courts are continually recognizing new tort actions to remedy the "unreasonable interference with the interests of others."[143] Tort law is "anything but static" and there are no limitations placed on its growth.[144] Furthermore, "[w]hen it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy."[145] The primary rationale for the constant evolution of tort law is that it allows a possible remedy where one may not otherwise be available.[146] Furthermore, courts have reasoned that an innocent victim should "not be forced to suffer as a result of the spoliator's actions."[147]

This rationale was the main argument employed by the court in *Smith v. Superior Court*, the first case to hold that an independent tort existed for intentional spoliation.[148] The court in that case held that "California has long recognized '[f]or

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[140] *See* Smith v. Super. Court, 198 Cal. Rptr. 3d 829, 832 (Ct. App. 1984) (quoting PROSSER, *supra* note 35, at § 1, pp. 3-4 (4th ed. 1971)) ("When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not itself operate as a bar to a remedy.").

[141] *See id.* at 836 (finding that not allowing tort "encourage[s] violence and invite[s] depredation").

[142] *See* Cedars-Sinai Med. Ctr. v. Super. Court, 954 P.2d 511 (Cal. 1998) ("Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision . . . .").

[143] *Smith*, 198 Cal. Rptr. at 832; *see also* Levine, *supra* note 5, at 440-41.

[144] Levine, *supra* note 5, at 440.

[145] *Id.* at 440-41 (quoting PROSSER, *supra* note 35, at § 1, pp. 3-4 (4th ed. 1971)).

[146] *See Smith*, 198 Cal. Rptr. at 832; *see also* Hannah v. Heeter, 584 S.E.2d 560, 566 (W. Va. 2003).

[147] Stefan Rubin, *Tort Reform: A Call for Florida to Scale Back its Independent Tort for the Spoliation of Evidence*, 51 FLA. L. REV. 345, 365 (1999).

[148] *See Smith*, 198 Cal. Rptr. at 832 (quoting PROSSER, *supra* note 35, at § 1, pp. 3-4) ("Prosser instructs us that: 'New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court

every wrong there is a remedy,' and has allowed for new torts through legislative and judicial process."[149] As the *Smith* court recognized, examples of such new torts include: intentional infliction of emotional distress, invasion of privacy, infliction of prenatal injuries, and the alienation of the affections of a parent.[150]

Although courts have used this rationale for all forms of the spoliation tort, courts have indicated that this rationale applies with more force to third party spoliators than to first party spoliators.[151] The rationale is more fitting for third party spoliators because traditional sanctions, such as adverse inferences and default judgment, are not available against third parties who have no stake in the litigation.[152] Thus, to prevent innocent victims of spoliation from going uncompensated, some jurisdictions have found it necessary to recognize independent torts for spoliation caused by third parties.

2. Deterrence

Another major argument in favor of creating separate causes of action for spoliation is that the torts help to further deter the destruction of evidence.[153] Courts universally condemn spoliation as destroying the integrity of the justice system.[154] However, they disagree as to whether traditional methods of combatting spoliation are adequate to deter future destruction of evidence.[155] For example, in *Smith v. Superior Court*, the court found that to deny a party the opportunity to bring separate torts for spoliation is "[t]o deny the injured party the right to recover any actual damages . . . encourage[ing] violence and invite[ing] depredation."[156] As did the *Smith* Court, the majority of courts that have recognized independent causes of action for spoliation reason that traditional sanctions and criminal statutes are inadequate to deter the destruction of evidence.[157] Proponents of the torts claim that if the spoliated evidence is extremely detrimental to a litigant's case, the rewards for

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has struck out boldly to create a cause of action, where none had been recognized before . . . .'").

[149] *Id.*

[150] *Id.*

[151] *See* Levine, *supra* note 5, at 435.

[152] *Id.*

[153] *Smith*, 198 Cal. Rptr. at 836; *see also* Dowdle Butane Gas Co., Inc. v. Moore, 831 So. 2d 1124, 1130 (Miss. 2002).

[154] *See* Cedars-Sinai Med. Ctr. v. Super. Ct., 954 P.2d 511, 515 (Cal. 1998).

[155] Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351, 402 (1995) ("[C]onventional remedies such as the adverse inference or court sanctions provide only limited deterrence to willful spoliation.").

[156] *Smith*, 198 Cal. Rptr. at 836.

[157] Sykes, *supra* note 19, at 846-47 ("Since penalties are often lenient, the 'bad man' will spoliate evidence because the harshness of the penalties do not outweigh the advantage he will gain by spoliating. Because of this unfortunate reality, commentators argue that the adoption of an independent tort of spoliation will curtail such conduct and provide harsher penalties.").

spoliation far outweigh the risks posed by traditional remedies.[158] One commentator has even stated that "[t]he bad faith spoliator has nothing to lose and much to gain."[159] Thus, courts have reasoned that allowing independent torts for spoliation increases the severity of punishment and therefore adds greater deterrence than traditional remedies.[160]

Scholars recognize that, at least in theory, sanctions are the most "diverse and tailored remedies."[161] Some, however, have suggested that, in reality, sanctions have limitations on their usefulness and that these limitations also reduce their deterrent effects.[162] Specifically, sanctions under the Federal Rules and most state laws can only be awarded for violations of a court order or subpoena.[163] As a result, proponents of the spoliation torts argue that courts are powerless to punish spoliation that occurs prior to the grant of a motion to compel.[164] Discovery sanctions also do not apply to spoliation that occurs prior to the commencement of litigation.[165] Thus, supporters of the spoliation tort argue that traditional sanctions only encourage a spoliator to destroy the evidence as quickly as possible, rather than to preserve it.[166]

Supporters of the spoliation torts also argue that criminal statutes addressing the destruction of evidence are not as effective in deterring spoliation as one would think. In actuality, "commentators have struggled to find cases where a spoliator has been criminally prosecuted for destroying evidence in a civil case."[167] Instead, they have found that prosecutors are too busy dealing with "real crimes" and view spoliation as the "trial judge's problem."[168] These considerations have led some

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[158] Nolte, *supra* note 155, at 401 ("When particular evidence is severely detrimental to a party's case, there may be little incentive to preserve the evidence if production would cause the party to lose" and "a risk benefit analysis might encourage an adverse party to choose the spoliation alternative.").

[159] *Id.*

[160] *Id.* at 402 ("The potential for general or punitive damages significantly increases the severity of punishment, thereby increasing the liability a potential spoliator expects.").

[161] Judge, *supra* note 103, at 446.

[162] *Id.*; Stayton & Ray, *supra* note 57, at 32 ("There are two inherent limits to the effectiveness of the discovery sanctions as a remedy for spoliation: they can be applied only after litigation has commenced and only to parties in a case.").

[163] Judge, *supra* note 103, at 446.

[164] *Id.*

[165] *Id.*

[166] *Id.* ("[T]he primary message sent to the potential spoliator . . . may not be to preserve evidence, but rather to destroy it as quickly as possible.").

[167] *Id.* at 447; *see also* Nolte, *supra* note 155, at 355 ("Criminal obstruction-of-justice statutes provide only theoretical deterrence, as the absence of case law demonstrates . . . .").

[168] Judge, *supra* note 103, 447 ("Part of the explanation lies with prosecutors, who are overwhelmed dealing with 'real crime,' and who no doubt see civil litigation spoliation as the trial judge's problem."); *see also* Sykes, *supra* note 19, at 847 ("Since today's criminal justice system is overwhelmed by felony cases and pursuit of the 'big fish,' there is little time or resources to expend on spoliation prosecutions.")

states to adopt the spoliation torts in order to provide additional deterrence to the destruction of evidence.

3. Judicial Integrity

Another policy argument typically made by proponents of spoliation torts is that they promote judicial integrity. The judicial integrity argument is closely related to the compensation and deterrence rationales discussed above. Courts universally recognize that spoliation threatens the integrity of the judicial system because it increases the chances of erroneous decisions.[169] Supporters of the torts argue that allowing separate causes of action for spoliation will increase the judicial integrity of the courts by deterring future spoliation, and thus, by decreasing the chances of wrong decisions.[170] Furthermore, these supporters argue that judicial integrity will also be served by creating a remedy for every wrong committed against a victim who the law affords protection.[171]

B. Arguments Against Separate Torts

Although proponents of independent torts for spoliation advance several valid arguments, critics of the torts also have legitimate policy arguments that call into question the wisdom of recognizing these torts. The three most prominent arguments espoused by courts and commentators are that the spoliation torts are inherently speculative, they violate the policy against recognizing derivative tort remedies, and that traditional remedies are adequate to both deter and remedy spoliation.[172] These arguments as well as others will be discussed below.

1. Speculative Nature

One major problem courts have with recognizing independent torts for spoliation is that the torts, by their very nature, are inherently speculative.[173] In other words, even if a party can prove that evidence was intentionally destroyed, the court can never be certain as to what that evidence would have shown and how much the evidence would have weighed in the spoliation victim's favor.[174] Without knowing the exact contents of the evidence, it is impossible for a jury to meaningfully assess what role the missing evidence would have had.[175] Thus, the jury is left to speculate

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[169] *See* Rubin, *supra* note 147, at 364.

[170] *See* Smith v. Super. Ct., 198 Cal. Rptr. 829, 836 ("Deterrence is an important policy consideration for allowing the maintenance of suits when damages cannot be shown with certainty.").

[171] *See id.* at 832.

[172] Cedars-Sinai Med. Ctr. v. Super. Ct., 954 P.2d 511, 515 (Cal. 1998) ("Three concerns in particular stand out here: the conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct; the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases.").

[173] *See id.* at 518.

[174] *See id.*

[175] *Id.*

as to what the missing evidence would have shown and what effect it would have had on the outcome of the underlying litigation.[176] One court went so far as to say:

> It is impossible to know what the destroyed evidence would have shown. . . . It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit. . . . The lost evidence may have concerned a relevant, but relatively trivial matter. If evidence would not have helped to establish plaintiff's case, an award of damages for its destruction would work a windfall for the plaintiff.[177]

Courts and commentators have also noted that, in addition to receiving a possible windfall, the inherently speculative nature of the torts may lead to erroneous decisions and inconsistency.[178] Furthermore, along with the speculative nature as to whether the plaintiff's case was in fact harmed by the spoliation, speculation also exists as to the amount of damages that the original jury would have awarded absent the spoliation.[179] Thus, critics of the torts argue that they cannot accurately compensate victims or "correct errors in the determination of the issues in the underlying litigation."[180]

2. Derivative Tort Remedies

Traditionally, courts have followed a policy of not recognizing derivative torts, which are those based on litigation-related misconduct in an underlying case.[181] The rational behind the courts' non-recognition of derivative tort remedies is rooted in procedural and policy considerations that are not present in traditional tort actions.[182] In particular, courts have generally recognized that derivative tort remedies based on litigation misconduct work to further prolong litigation.[183] For example, the Supreme Court of California has found that creating independent torts for spoliation "encourages a spiral of lawsuits" because allowing derivative tort remedies increases

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[176] *Id.* at 518.

[177] *See id.* at 518-19.

[178] See Stayton & Ray, *supra* note 57, at 33.

[179] *See id.* (The jury in an independent tort action would not only have to infer what the destroyed evidence might have proven but also have to determine what the original jury might have given the nonspoliating party had this evidence been presented to the original jury.).

[180] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 519.

[181] *See id.*; *see also* Levine, *supra* note 5, at 441 (recognizing derivative torts as inefficient).

[182] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 515 ("[The] inquiry into whether to create a tort remedy for the intentional spoliation of evidence must begin with the recognition that using tort law to correct misconduct arising during litigation raises policy considerations not present in deciding whether to create tort remedies for harms arising in other contexts.").

[183] *Id.*; *see also* Nolte, *supra* note 155, at 398 ("[C]reation of a new cause of action [for spoliation] increases the likelihood of litigation. With an increase in lawsuits, social costs would necessarily escalate as well.").

the filing of frivolous claims.[184] Courts have found that derivative torts increase the filing of frivolous lawsuits because, in any lawsuit, evidence will inevitably be lost or unavailable and, as a result, spoliation torts invite disappointed litigants to essentially retry their cases.[185]

In *Cedars-Sinai Medical Center*, the court suggested that recognizing independent torts for spoliation could over-burden the justice system: "To allow a litigant to attack the integrity of evidence after the proceedings have concluded . . . would impermissibly burden, if not inundate, our justice system."[186] The same court also recognized many similarities between spoliation and perjury, in that they both work to undermine judicial integrity and the fact-finding process.[187] However, courts have long recognized that "it would be productive of endless litigation" to permit the victim of perjury to bring an independent cause of action for damages.[188] The rationale behind not recognizing independent causes of action for perjury and spoliation rests on the concern that doing so would diminish judicial integrity by disregarding "the finality of adjudication."[189]

3. Adequacy of Traditional Remedies

Along with the policy considerations discussed in the previous sections, most courts that have declined to recognize the various torts for spoliation have reasoned that traditional remedies are adequate to combat the destruction of evidence.[190] In fact, a majority of state courts have found that traditional sanctions are a preferred remedy because they can be narrowly tailored to a specific set of circumstances,[191] and have noted that state legislatures remain free to create additional sanctions to combat spoliation as needed.[192] In addition to sanctions, many states have criminal

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[184] *See Cedars-Sinai Med. Ctr.*, 954 P.2d at 515.

[185] *See id.*

[186] *Id.* at 516.

[187] *Id.* ("Perjury, like spoliation, undermines the search for truth and fairness by creating a false picture of the evidence before the trier of fact."); *see also* Levine, *supra* note 5, at 446 ("Another reason given not to adopt the spoliation tort, and that can also be reduced to the court system's desire to see an end to litigation, is that destruction of evidence is similar to perjury or embracery 'in that both undermine the integrity of a trial; yet, there are no independent torts recognized for these crimes.'").

[188] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 516 (quoting Smith v. Lewis, 3 Johns. 57, 168 (N.Y. 1808)).

[189] *Id.* at 516; *see also id.* at 517 (quoting Pico v. Cohn, 91 Cal. 129, 133-34 (1891)) ("Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice . . . .").

[190] *See supra* note 135.

[191] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 515 ("[W]e have favored remedying litigation-related misconduct by sanctions imposed within the underlying lawsuit rather than by creating new derivative torts."); *see also* Levine, *supra* note 5, at 441 ("Perhaps the strongest argument against the adoption of most variations of the spoliation tort is that there are various remedies and claims already available that can sufficiently handle instances of spoliation of evidence.").

[192] *See* Judge, *supra* note 103, at 462.

statutes that address spoliation.[193] Since the willful destruction of evidence does not appear to be widespread, the majority of courts have thus found that these remedies are generally adequate to address the problem of spoliation.[194]

Specifically, courts reason that the adverse inference is the best way to both deter and remedy spoliation because it more appropriately places the victim in his original position by simply instructing the jury to infer that the evidence would have been favorable.[195] In addition to the adverse inference, detractors of independent torts for spoliation argue that other sanctions, such as discovery and monetary sanctions, are powerful weapons to be used against spoliators.[196] Thus, critics of the tort argue that victims of spoliation remain free to pursue a variety of remedies to provide proper compensation.

4. Private Property Concerns

Another problem with recognizing independent torts for spoliation is that, in many cases, the spoliated evidence will be a third party's private property.[197] Obviously, this is especially problematic in cases of third party spoliation.[198] In such cases, the third party is directed to preserve as evidence his own property.[199] Since "[a] property owner normally has the right to control and dispose of his property as he sees fit[,] [t]he owner of the property may legitimately question what right a plaintiff has to direct control over such property."[200] Allowing claims for third party intentional spoliation may undermine the fundamental right of that party to control his own property as he sees fit.

Additionally, aside from being unable to control one's own property, there can be significant costs associated with the preservation of evidence. Specifically, the costs associated with "causing persons or entities to take extraordinary measures to

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[193] *See supra* note 58; *see also* Levine *supra* note 5, at 432.

[194] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 518 ("The infrequency of spoliation suggests that existing remedies are generally effective at deterring spoliation.").

[195] *Id.* ("There are a number of nontort remedies that seek to punish and deter the intentional spoliation of evidence. Chief among these is the evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party."); *see also* Levine, *supra* note 5, at 441 ("The spoliation inference . . . has been deemed superior to the tort on the grounds that is 'more efficient, it avoids the horrors of derivative litigation, and it does the best job of fairly compensating the victimized party.'").

[196] *See Cedars-Sinai Med. Ctr.*, 954 P.2d at 517 ("The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party.").

[197] *See* Bart S. Wilhoit, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 671 (1998).

[198] *Id.*

[199] *Id.*

[200] Oliver v. Stimson Lumber Co., 993 P.2d 11, 18 (Mont. 1999).

preserve for an indefinite period . . . things of no apparent value solely to avoid the possibility of spoliation liability if years later those items turn out to have some potential relevance to future litigation."[201] Critics of the spoliation torts argue that requiring third parties to preserve such evidence is simply too burdensome and that the lack of remedies for spoliation committed by third parties is over-exaggerated.[202]

VI. OHIO LAW

In 1993, Ohio became one of the few states to recognize independent causes of action for spoliation.[203] Specifically, the Supreme Court of Ohio held, in *Smith v. Howard Johnson Co., Inc.*, that Ohio recognizes separate causes of action for both first party and third party intentional spoliation.[204] The court was not, however, clear as to whether the holding extended to negligent spoliation.[205]

Although the court in *Howard Johnson* was directly asked whether Ohio recognizes intentional or negligent spoliation, whether the court actually extended its holding to include negligent spoliation is unclear.[206] Instead, the court's holding is ambiguous, simply stating: "[a] cause of action exists in tort for interference with or destruction of evidence."[207] Some appellate courts, however, have since addressed the issue and have found that Ohio does not recognize separate torts for negligent spoliation.[208]

Typically, in Ohio, a claim for spoliation must be brought during the underlying cause of action.[209] A case for intentional spoliation may be brought after the underlying suit only if the spoliation was discovered after the conclusion of the primary cause of action.[210] The limitation on when a cause of action for spoliation may be brought is undoubtedly designed to alleviate some of the above-discussed policy concerns associated with derivative torts.[211]

VII. ANALYSIS AND RECOMMENDATIONS

The following section will analyze the merits of the policy considerations discussed in the previous sections and will apply them to the various types of spoliation torts. Specifically, in light of these policy arguments, the following section

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[201] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 519.

[202] *See* Judge, *supra* note 103, at 459.

[203] *See generally* Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037 (Ohio 1993).

[204] *Id.*

[205] *See id.*

[206] *Id.*

[207] *Id.* at 1038.

[208] *See* Woodell v. Ormet Primary Aluminum Corp., No. 03 MO 7, 2005 WL 2033285 (Ohio Ct. App. Aug. 19, 2005); *see also* Drawl v. Cornicelli, 706 N.E.2d 849 (Ohio Ct. App. 1997).

[209] *See* Davis v. Wal-Mart Stores, Inc., 756 N.E.2d 657, 660 (Ohio 2001).

[210] *Id.*

[211] *See id.*

will explore whether Ohio should recognize any of the different causes of action for spoliation.

A. Ohio Should Cease to Recognize Independent Torts for Intentional Spoliation of Evidence

Ohio should overturn its recognition of torts for both first and third party intentional spoliation. In recognizing separate causes of action for spoliation, it appears that Ohio fell into the same trap as California and Florida. Namely, being overzealous to recognize new tort remedies without fully considering the problems posed by their recognition. Conspicuously lacking in the court's one page opinion in *Howard Johnson*, is any discussion of the policy considerations discussed in the previous section.[212] What is clear, however, is that those policy considerations weigh against recognizing independent tort remedies for intentional spoliation. The following section will seek to prove that the problems associated with recognizing torts for intentional spoliation far outweigh the benefits.

1. Recognizing Independent Torts for Intentional Spoliation Does Little to Further Deter the Willful Destruction of Evidence

One of the main rationales employed by proponents of the independent tort for intentional spoliation is that the tort will help to further deter the willful destruction of evidence.[213] Proponents argue that traditional remedies do not adequately deter spoliation because the penalties are not harsh enough,[214] as they do not extend to pre-trial litigation and criminal statutes are rarely enforced.[215]

While discovery sanctions do not extend to pre-trial spoliation, courts nonetheless have the inherent authority to impose a wide variety of sanctions and are typically given broad discretion to do so.[216] These sanctions include monetary sanctions that can be multiplied for punitive purposes, adverse inferences, default judgment, and dismissal, among others.[217] It is difficult to imagine that there exists any harsher penalty than default judgment or dismissal, especially considering that monetary penalties also remain available for punitive purposes.[218] Additionally, as the court in *Cedars-Sinai Medical Center* noted, although the discovery sanctions generally do not extend to pre-trial spoliation, the vast majority of spoliation occurs during discovery.[219] Thus, "there is no reason to conclude that instances of spoliation that remain hidden during discovery . . . would come to light afterward solely [because] of the existence of a tort remedy."[220] Furthermore, given the tort's

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[212] *See generally* Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037 (Ohio 1993).

[213] *See supra* Part V.A.2.

[214] *See supra* Part V.A.2.

[215] *See supra* Part V.A.2.

[216] *See supra* Part III.A.

[217] *See supra* Part III.A.

[218] *See supra* Parts III.A.2, 4.

[219] *See* Cedars-Sinai Med. Ctr. v. Super. Ct., 954 P.2d 511, 520-21 (Cal. 1998).

[220] *Id.*

speculative nature,[221] it is unlikely that tort remedies would increase deterrence "by more accurately compensating the spoliation victim and thus reducing the benefit to the spoliator."[222]

In most jurisdictions, prosecutors also maintain the right to prosecute intentional spoliators.[223] Just because they are reluctant to do so, does not justify the creation of independent torts for spoliation. Furthermore, state legislatures are also free to create further sanctions that would help deter future spoliation. Creating a separate cause of action for first party intentional spoliation, therefore, is unnecessary because it will not be of any greater deterrence than traditional remedies.

However, the deterrence rational does apply with more force to intentional third party spoliation because many of the traditional sanctions available against a party to the lawsuit are not available against third parties.[224] "This issue is particularly important to tort proponents because it is really their last line of defense—without a spoliation tort, there may be no civil remedy to compensate a litigant who is victimized by a nonparty spoliator."[225]

Although a number of jurisdictions, including the District of Columbia, Alabama, and Montana, have accepted this rationale, it is generally unfounded.[226] Courts have noted that in most instances where a third party spoliator intentionally destroys evidence, he will not be a complete stranger to the litigation and will have some stake in the outcome of the case.[227] Otherwise, the third party would have little, if any, incentive to intentionally destroy evidence important to the litigation.[228] In fact, California appears to be one of the only states that have confronted a case involving

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[221] *See supra* Part V.B.1.

[222] *See Cedars-Sinai Med. Ctr.*, 954 P.2d at 521.

[223] *See supra* Part III.B.

[224] *See generally* Oliver v. Stimson Lumber Co., 993 P.2d 11, 17-18 (Mont. 1999) ("When evidence is in possession of a third party . . . the various sanctions available to the trial judge are inapplicable and other considerations arise."). *See also* Levine, *supra* note 5, at 445 ("[Traditional] remedies . . . appear to be at least as adequate as a tort for spoliation of evidence would be and account for all instances of spoliation except for intentional spoliation by a third party."); *see also* Judge, *supra* note 103, at 459 ("Unlike spoliation by parties to the lawsuit, which can be neutralized and punished with an evidentiary inference, sanctions or both, nonparties are generally not subject to these remedies.").

[225] Judge, *supra* note 103, at 459.

[226] *See Oliver*, 993 P.2d 11 (recognizing cause of action for third party intentional spoliation and third party negligent spoliation); *see also* Holmes v. Amrex Rent-A-Car, 180 F. 3d 294 (D.C. Cir. 1999) (recognizing independent tort for negligent third-party spoliation); Smith v. Atkinson, 771 So. 2d. 429 (Ala. 2000) (recognizing cause of action for third party negligent spoliation); Judge, *supra* note 103, at 459.

[227] *See* Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124, 1132 (Miss. 2002) (discussing *Cedars-Sinai Medical Center v. Superior Court*); *see also* Judge, *supra* note 103, at 461 ("[T]he chance that valuable evidence will end up in the possession of someone with absolutely no interest in litigation between the primary parties is extremely slim.").

[228] *Dowdle Butane Gas Co.*, 831 So. 2d at 1132 ("[I]n many instances . . . the third party spoliator may not be a total stranger to the litigation, as there is little motivation to spoliate where the third party is wholly divorced from the litigation.").

an uninterested third party at all.[229] Instead, it is far more likely that a third party will have some sort of agency relationship with one of the litigants, in which case sanctions may be imputed to that litigant.[230] For example, where a party's expert witness destroys or alters evidence, the court may impose the sanction of evidence preclusion and forbid the expert from testifying on what that evidence may or may not have shown.[231]

As indicated above, the need for an independent tort for third party intentional spoliation is largely exaggerated. Courts that have realized this exaggeration have shown that there are traditional remedies available to victims of third party spoliation and that the victim is not "entirely helpless."[232] In the rare case where a third party intentional spoliator is a complete stranger to litigation, monetary and contempt sanctions are available to deter future spoliators.[233] Furthermore, if the plaintiff truly faces a situation where a third party is in possession of valuable evidence, the plaintiff could arguably still resort to "quasi-in-rem jurisdiction, and essentially file suit against the piece of evidence itself."[234] The plaintiff could then seek a preliminary injunction or even a temporary restraining order against the party in possession of the evidence, which would force them to preserve it.[235] Lastly, although prosecutors are often reluctant to pursue criminal charges against a spoliator in civil litigation,[236] they remain free to do so against third parties, while allowing the trial judge to handle spoliation issues that arise between the parties of the underlying suit. Thus, the fear that there are little or no remedies in place to adequately deter intentional third-party spoliation is clearly without basis.

2. The Derivative Nature of the Torts Poses Problems that Far Outweigh Any Benefits Associated with Recognizing Independent Torts for Intentional Spoliation

As discussed above, one of the main rationales behind the recognition of independent torts for intentional spoliation is that tort law is constantly coming up with "new and nameless" torts to compensate victims that have been wronged.[237] However, courts also have a longstanding policy against recognizing derivative torts based on litigation-related misconduct.[238] This policy concern is rooted in procedural concerns that are not present with traditional tort remedies.[239]

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[229] Judge, *supra* note 103, at 459.

[230] *Id.* ("[T]he laws of agency typically will allow the court to impute sanctions to one of the parties.").

[231] *Id.*

[232] Temple Cmty. Hosp. v. Super. Ct., 976 P.2d 223, 232 (Cal. 1999).

[233] *Id.*

[234] Judge, *supra* note 103, at 461.

[235] *Id.*

[236] *See supra* Part V.A.II.

[237] *See supra* Part V.A.I.

[238] *See supra* Part V.B.II.

[239] Cedars-Sinai Med, Ctr. v. Super. Ct., 954 P.2d 511, 514-15 (Cal. 1998).

Specifically, derivative torts work to prolong litigation and "encourage[] a spiral of lawsuits."[240] Derivative tort remedies for intentional spoliation are also subject to abuse because in many cases, potentially relevant evidence will no longer be available at the time of trial simply because it was inadvertently lost or misplaced.[241] The mere fact that evidence is unavailable allows disappointed litigants to sue the prevailing party for spoliation, regardless of whether the evidence was lost or destroyed intentionally.[242] This appears to be the case in Ohio, as a non-exhaustive look at spoliation cases in the state appears to show that the vast majority of claims fail to make it past summary judgment on the issue of willful spoliation.[243] It appears that California's fear that allowing independent torts for spoliation "would impermissibly burden, if not inundate our justice system" may be coming to fruition in Ohio.[244] Since it appears that very few spoliation cases are actually successful in Ohio, the argument that a large quantity of spoliation victims will go uncompensated, if not for the tort, loses much of its luster.

Furthermore, even in the rare case where the plaintiff does have a meritorious cause of action for spoliation, there are a number of additional problems associated with the torts. Aside from the policy issues discussed above, there are also procedural issues that come along with recognizing derivative tort remedies, and

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[240] *Id.* at 515.

[241] *Id.* at 519 ("A separate tort remedy would be subject to abuse, for in many cases potentially relevant evidence will no longer exist at the time of trial, not because it was intentionally destroyed but simply because it has been discarded or misplaced in the ordinary course of events.").

[242] *Id.* at 520 ("The mere fact of destruction . . . would permit a disappointed litigant to sue the prevailing party for spoliation, [even though] in many cases the issue of the defendant's purpose in destroying the evidence [is uncertain] . . . ."); *see also* James F. Thompson, *Spoliation of Evidence: A Troubling New Tort*, 37 U. KAN. L. REV. 563, 592 (1989) ("A new cause of action could accrue each time a plaintiff loses a lawsuit, for in most cases there is likely to be some place of potential evidence that is not available at the time of trial.").

[243] *See* Thomas v. Cleveland Clinic Found., No. 85276, 2005 WL 2100922 (Ohio Ct. App. Sept. 1, 2005) (affirming directed verdict because failed to show evidence destroyed willfully); *see also* Sivinski v. Kelley, No. 94296, 2011 WL 1744262 (Ohio Ct. App. May 5, 2011); Allstate Ins. Co. v. QED Consultants, Inc., No. 09CA14, 2009 WL 2973503 (Ohio Ct. App. Sept. 16, 2009) (finding plaintiff failed to show willful spoliation); Mitchell v. Norwalk Area Health Servs., No. H-05-002, 2004 WL 2415995 (Ohio Ct. App. Sept. 30, 2005) (finding no evidence destruction of evidence done willfully); Woodell v. Ormet Primary Aluminum Corp., No. 03 MO 7, 2005 WL 2033285 (Ohio Ct. App. Aug. 19, 2005); Bugg v. Am. Standard, Inc., No. 84829, 2005 WL 1245043 (Ohio Ct. App. May 26, 2005) (finding plaintiff failed to show third element that evidence destroyed willfully); Boggs v. The Scotts Co., No. 04AP-425, 2005 WL 647560 (Ohio Ct. App. Mar. 22, 2005) (finding no support for claim defendant deliberately destroyed evidence); Wachtman v. Meijer, No. 03AP-948, 2004 WL 2757832 (Ohio Ct. App. Dec. 2, 2004) (finding plaintiff failed to allege willful destruction of evidence); Ciganick v. Kaley, No. 2004-P-0001, 2004 WL 2580593 (Ohio Ct. App. Nov. 12, 2004) (finding plaintiff failed to show spoliation was willful); Tate v. Adena Reg'l Med. Ctr., 801 N.E. 2d. 930 (Ohio Ct. App. 2003) (finding plaintiff failed to show destruction was willful); White v. Ford Motor Co., 755 N.E. 2d. 954 (Ohio Ct. App. 2001) (finding plaintiff failed to show evidence willfully destroyed). *But see* White v. Equity, Inc., 945 N.E. 2d. 536 (Ohio Ct. App. 2010) (finding plaintiff set forth claim for spoliation).

[244] *See Cedars-Sinai Med. Ctr.*, 954 P.2d at 516.

specifically, torts for spoliation. Mainly, states vary at what point a cause of action for spoliation against a party to the underlying claim may be brought. Ohio typically only allows the spoliation tort to be brought during the underlying action unless the spoliation is not discovered until after the underlying suit has concluded.[245] Other states, however, allow the tort for spoliation to be brought after the underlying suit regardless of when the spoliation was discovered.[246]

Although requiring the suit to be brought during the underlying cause of action necessarily hastens the litigation process, it also poses other problems, such as jury confusion and inconsistency.[247] Jury confusion occurs because the jury must decide two different claims, with overlapping issues and evidence, at the same time.[248] This process begins with the jury first having to decide the underlying claim and whether to apply an adverse inference to the spoliated evidence.[249] In deciding the underlying claim, one of two decisions can be made: (1) application of the adverse inference is warranted; or (2) application of the adverse inference is unwarranted.[250] Either way the decision turns, it appears, at least theoretically, that an alleged spoliation victim should not be able to recover under the spoliation tort if the jury is consistent.[251]

For example, if the application of the adverse inference is warranted, it necessarily must have been decided that the evidence was both significant and destroyed intentionally.[252] Once the adverse inference is granted, in order to show damages in the subsequent tort claim, the alleged spoliation victim must lose the underlying case, despite the granting of the adverse inference.[253] However, in deciding that the spoliation victim still loses, it must have necessarily been decided that, despite inferring a reasonable interpretation of what the evidence would have shown, the spoliation victim still cannot state a claim.[254] If the jury is consistent during the subsequent spoliation tort, it appears it necessarily must decide that the missing evidence was not the proximate cause of the victim losing the underlying case because it assumed the missing evidence's importance and veracity and the spoliation victim still lost.[255] Thus, it appears that if the adverse inference is granted

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[245] *See supra* Part VI.

[246] *See Cedars-Sinai Med. Ctr.*, 954 P.2d at 516.

[247] *Id.* at 520.

[248] *See id.*

[249] *Id.*

[250] *Id.*

[251] *See id.*

[252] *See supra* Part III.A.1 (Courts will generally find the granting of an adverse inference appropriate only if the following elements are satisfied: "(1) an act of destruction; (2) discoverability of the evidence; (3) an intent to destroy the evidence; (4) occurrence of the act at a time after suit has been filed, or, if before filing, at a time when the finding is fairly perceived as imminent.")

[253] *See supra* Part IV (All forms of the spoliation tort require the alleged victim to lose the underlying suit in order to show damages.).

[254] *See Cedars-Sinai Med. Ctr.*, 954 P.2d at 520.

[255] *See id*; *see also supra* Part IV (All forms of the spoliation tort require the spoliation plaintiff to prove proximate cause.).

at all during the underlying claim, the alleged spoliation victim should not be able to prevail during the subsequent tort action if the jury is consistent.

If, however, it is decided that application of the adverse inference in the underlying suit is unwarranted, it must have necessarily been found that either the spoliation was unintentional or the evidence was insignificant. [256] If the spoliation was unintentional, then the alleged spoliation victim cannot bring an independent tort in Ohio because Ohio only recognizes intentional spoliation as a separate claim.[257] Likewise, if the evidence is not significant enough to warrant the adverse inference, then it most likely is not the proximate cause of the alleged victim's failure to prove his case.[258] Again, if the jury is consistent during the subsequent tort action, then it appears that a spoliation victim should not be able to prevail if the adverse inference is found to be unwarranted either.[259] Thus, theoretically, if the jury is consistent during the subsequent tort claim, the spoliation plaintiff should not recover regardless of the scenario. "At the least, this would be confusing to the jury; at most, it would lead to inconsistent results."[260]

As demonstrated above, trying a tort case for spoliation simultaneously with the underlying claim poses multiple problems; however, requiring the tort case for spoliation to commence after the underlying suit is also problematic because it prolongs litigation. The spoliation action would essentially be a retrial of the underlying claim because all of the evidence would have to be presented again for the jury to properly determine the effect that the spoliated evidence would have had on the outcome of the case.[261] In sum, it appears that, although in some instances spoliation torts might advance judicial integrity, the vast majority of cases will only serve to overwhelm our justice system and drain its resources.

3. Traditional Methods are Better at Accurately Compensating Victims of Intentional Spoliation Because the Tort is Inherently Speculative

Supporters of independent torts for intentional spoliation also argue that the torts promote judicial integrity by providing remedies to compensate victims where they may not otherwise be available.[262] However, just because the torts "compensate" victims, does not mean that they promote judicial integrity by doing so accurately. As critics of the intentional spoliation tort have suggested, the speculative nature of the torts not only calls into question whether the plaintiff was in fact harmed by the spoliation, it also is speculative as to the amount of damages that should be awarded.[263] Furthermore, critics of the spoliation tort have noted that the inherently speculative nature of the tort may lead to erroneous decisions, windfall for the

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[256] *See supra* note 252.

[257] *See supra* Part VI.

[258] *See supra* Part IV.

[259] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 514-15.

[260] *Id.*

[261] *Id.*

[262] *See supra* Part V.A.1.

[263] *See supra* Part V.B.1.

plaintiff, and inconsistency.[264] For example, theoretically, in cases of third-party spoliation, both parties could file suit against a third party and, because of the speculative nature of the tort, both could argue that the evidence would have been favorable to him.[265] As a result, the majority of courts have found that traditional methods of combatting spoliation are superior to the spoliation torts.[266]

Specifically, the adverse inference more accurately compensates victims of spoliation and thus is a superior remedy for cases of intentional spoliation.[267] The adverse inference more accurately places the party in its original position, rather than obsessing over creating a separate remedy.[268] Instead of seeking to provide a remedy that is speculative at best, the adverse inference "gives the aggrieved party the benefit of the doubt created," which allows the jury to assess the proper remedy.[269] In addition to the adverse inference, courts have broad discretion to tailor other remedies to the specific circumstances of the case, including issue preclusion and monetary sanctions.[270] In egregious cases, where an adverse inference and monetary sanctions are not enough, courts are also free to dismiss the case or enter default judgment.[271] Thus, there is little reason to recognize a separate cause of action for first party intentional spoliation.

As discussed above, although many of the traditional sanctions do not apply to third parties, it is extremely unlikely that a third party with absolutely no ties to the underlying claim will be in possession of crucial evidence.[272] Furthermore, if the party has absolutely no stake in the underlying cause of action there is little motivation for a third party to intentionally destroy evidence.[273] Traditional sanctions, therefore, can serve to adequately compensate victims of third party intentional spoliation. As a result, Ohio would be wise to overrule its decision in *Howard Johnson* and stop recognizing both first and third party intentional spoliation.

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[264] *Cedars-Sinai Med. Ctr.*, 954 P.2d at 515.

[265] *See* Judge, *supra* note 103, at 460.

[266] *See supra* Part V.B.III.; *see also* Sykes, *supra* note 19, at 848 ("Most courts hold that available remedies fairly compensate parties harmed.").

[267] *See* Judge, *supra* note 103, at 464 ("The adverse inference is superior to the spoliation tort because it is more efficient, it avoids the horrors of derivative litigation, and it does the best job of fairly compensating the victimized party."); *see also* Margaret O'Mara Frossard & Neal S. Gainsberg, *Spoliation of Evidence in Illinois: The Law After* Boyd v. Travelers Insurance Co., 28 LOY. U. CHI. L.J. 685, 702-03 (1997) (finding that Connecticut and Maryland refused to recognize independent tort for spoliation because adverse inference superior); Levine, *supra* note 5, at 441 ("The spoliation inference . . . has been deemed superior to the tort on the grounds that it is 'more efficient, it avoids the horrors of derivative litigation, and it does the best job of fairly compensating the victimized party.'").

[268] *See* Judge, *supra* note 103, at 464.

[269] *Id.*

[270] *Id.* at 446-47; *see also supra* Part III.A.

[271] *See supra* Part III.A.2.

[272] *See supra* Part VII.A.1.

[273] *See supra* Part VII.A.1.

B. Ohio Should Not Recognize Independent Torts for Negligent Spoliation of Evidence

So far, Ohio has refused to recognize causes of action for first and third party negligent spoliation,[274] and it should continue to do so. Although some of the problems that arise with intentional spoliation are not present when it comes to negligent spoliation, many of the same, and additional problems, are associated with negligent spoliation. These problems will be discussed below in relation to the policy arguments asserted by proponents of negligent spoliation.

Although an argument can be made that independent torts for intentional spoliation are necessary to further deter future spoliation, that argument has little, if any, merit for claims of negligent spoliation. Commentators have found that "tort liability for negligent acts adds little to deterrence because most individuals are rarely involved in tortious situations and, therefore, have little incentive to learn how to avoid tortious behavior."[275] Thus, the idea that creation of an independent tort for negligent spoliation will cause people to be more careful with evidence is tenuous at best.

Moreover, creation of independent torts for negligent spoliation would create unnecessary duties on individuals to preserve evidence.[276] A third party in possession of potentially relevant evidence would be forced to carefully preserve that evidence even though it ultimately may have no bearing on the case.[277] Otherwise, he may be opening himself up to potential litigation even though the evidence was not destroyed for the purpose of disrupting the party's case.[278] Furthermore, in cases where evidence is the personal property of a third party, the court would be interfering with that party's right to use his property as he sees fit. [279] New torts for negligent spoliation, therefore, would be "too expansive and impose an unreasonable duty on property owners to maintain their personal property."[280] As a result, other remedies are far more appropriate to combat the negligent destruction of evidence.

However, like with intentional spoliation, supporters argue that traditional methods used to combat negligent spoliation are inadequate because, in most states, the adverse inference is not available in cases of negligent spoliation.[281] Some states, however, including Ohio, have extended the possibility of an adverse inference to cases involving gross negligence.[282] But, courts do remain free to use the adverse

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[274] *See* Woodell v. Ormet Primary Aluminum Corp., No. 03MO7, 2005 WL 2033285 (Ohio Ct. App. Aug. 19, 2005); *see also* Drawl v. Cornicelli, 706 N.E.2d 849 (Ohio Ct. App. 1997).

[275] Levine, *supra* note 5, at 436 (quoting Wilhoit, *supra* note 197, at 651-52).

[276] *See* Frossard & Gainsberg, *supra* note 267, at 703-04 ("[A] new tort for negligent spoliation would be too expansive and impose an unreasonable duty on property owners to maintain their personal property.").

[277] *See supra* Part V.B.4.

[278] *See supra* Part V.B.4.

[279] *See supra* Part V.B.4.

[280] Frossard & Gainsberg, *supra* note 267, at 703-04.

[281] Levine, *supra* note 5, at 428-29.

[282] *See* Roetenberger v. Christ Hosp., 839 N.E.2d 441, 447-48 (Ohio Ct. App. 2005) (leaving open possibility of adverse inference being used in cases of gross negligence).

inference as a way to compensate victims of spoliation, rather than as a "punishment device."[283] By looking more to the importance of the missing evidence, as opposed to the intent of the party, the adverse inference could be expanded to include cases of negligent spoliation.[284] Thus, the adverse inference can still be an effective tool in combatting negligent spoliation if courts choose to extend its use to certain instances of negligence.[285]

Unlike third party intentional spoliation, however, it does not necessarily follow that a third party in a negligent spoliation claim will have some stake in the underlying suit. Although there is little motivation to intentionally destroy evidence if a party has no stake in the underlying suit,[286] a party could have absolutely no stake in the litigation and accidentally spoliate evidence. This, however, is also highly unlikely because the third party must have undertaken some duty to preserve the evidence. Furthermore, even if Ohio were to decide that an additional remedy for third-party negligent spoliation is necessary, there is no reason to create an entirely separate cause of action. Instead, several courts have found that "a simple negligence claim is fully capable of covering instances of negligent spoliation" and "that a negligent spoliation claim is essentially a disguised negligence claim ."[287] Thus, there is simply no need for Ohio to recognize either first or third party negligent spoliation as independent torts.

VIII. CONCLUSION

In light of the discussion above, Ohio should not recognize independent torts for spoliation because the torts are inherently speculative, their derivative nature prolongs litigation and invites frivolous claims, and traditional sanctions and criminal statutes are adequate to remedy and deter spoliation. Even with the many problems, however, a small number of proponents continue to justify the torts under the rationale that for every wrong there should be a remedy. Although an admirable goal, the problems that come along with the spoliation torts make their recognition imprudent.

The torts are inherently speculative because, by their very nature, it is impossible for juries to determine exactly what the destroyed or altered evidence would have shown or how it would have effected a party's case. Thus, at the very least, the jury is forced to take an educated guess as to what the evidence would have shown and how the underlying case would have been effected by that evidence. As a result, traditional remedies, such as the adverse inference, more accurately compensate victims of spoliation and decrease the likelihood of erroneous decisions and wrongful recoveries.

Moreover, because the tort is a derivative tort, it unnecessarily prolongs litigation and invites spurious claims. Frequently in litigation, evidence is lost or destroyed

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[283] Judge, *supra* note 103, at 463-64.

[284] *Id.*

[285] *Id.* at 463-64 ("[T]his Comment recommends that [the adverse inference] . . . be extended to negligent spoliation of evidence, and that its use as a punishment device be curtailed.").

[286] *See supra* Part VII.A.1.

[287] *See* Levine, *supra* note 5, at 442-43.

regardless of the level of care used by the parties. Thus, the torts invite disappointed litigants, in almost any case, to bring frivolous claims that the evidence was destroyed intentionally when, in reality, it was destroyed inadvertently. Although meritorious spoliation claims are possible, any good provided by the tort is vastly outweighed by the economic burden it places on the courts by encouraging frivolous claims and prolonging underlying litigation.

This burden is also unnecessary considering the adequacy of various sanctions designed to combat spoliation and the fact that these sanctions can be narrowly tailored to the specific circumstances of each case.

Additionally, courts remain free to expand these traditional methods and state legislatures are free to create entirely new sanctions. Ohio should, therefore, join the vast majority of states in declining to recognize derivative spoliation torts in all of their forms.